No. 82-929

In the

Supreme Court of the United States

OCTOBER TERM, 1982

GERALD BURKS,

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari
To The Appellate Court Of Illinois,
First Judicial District

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether petitioner was afforded due process where the record affirmatively demonstrates, and the Appellate Court so found, that evidence of a prosecution witness' bias was fully presented to the jury through cross-examination and argument to the jury, where petitioner waived the issue in the state trial court below and where the record is devoid of support for petitioner's contention that the prosecution made knowing use of perjured testimony, or made a false statement to the jury during argument.

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OPINION BELOW

The Illinois Appellate Court opinion is appended to petitioner's petition for certiorari and is reported below as *People* v. *Eddie Harris*, 104 Ill. App. 3d 1203 (1st Dist. 1982), pursuant to Illinois Supreme Court Rule 23, Ill. Rev. Stat. 1981, ch. 110A, §23.

JURISDICTION

The jurisdictional requisites have been set forth in the petition. However, as treated more fully in the argument contained herein, respondent does not believe that the petitioner has satisfied the jurisdictional prerequisites of 28 U.S.C. §1257(3) or has shown any reason for the Court to exercise its sound discretion to grant his petition for a Writ of Certiorari, especially where the state court ruled on the merits of petitioner's claim.

STATEMENT OF THE CASE

Following a jury trial, petitioner was convicted of the murder of Venson Bass. (R. 522) The evidence at trial established that on March 16, 1978, at about 10:00 p.m., Eddie Harris and Gerald Burks, the petitioner, shot Venson Bass and threw him into Lake Michigan. (R. 197-202, 243, 307-309) The People's witnesses, Herman Shannon and Harry Trapp, were eyewitnesses to the events which resulted in the death of Venson Bass. (R. 197-202, 243, 307-309) On April 21, 1978, the body of Venson Bass was found at 62nd Street and the Lakefront in Chicago, Illinois, by Officer Ryan of the Chicago Police Department. (R. 77-80)

The pathologist's report indicated that Venson Bass had received multiple gun shot wounds to the head and neck. The report also indicated that the victim was alive when he was thrown into the lake because there was a large amount of sand and gravel found in his throat. (R. 90-91, 101) The proximate cause of death was multiple gunshot wounds to the head and neck. (R. 91)

Harry Trapp testified that he had been a narcotics user for many years, including the time of the instant

offense, (R. 312-315) and that he was a convicted felon with a pending charge for armed robbery at the time of petitioner's murder trial in May, 1980. (R. 286) On cross-examination Mr. Trapp was questioned regarding his testimony, one month earlier, as a State's witness in another prosecution arising from an armed robbery, unrelated to the instant murder prosecution, for which Mr. Trapp had been indicted. Mr. Trapp stated that he did not testify in the armed robbery trial in exchange for anything, but rather he testified "with the hope that I could get a lesser sentence." (R. 317) Harry Trapp's testimony was clear and unequivocal, and demonstrated that no one had promised him anything, nor made any deals with him. He consistently testified that his only motive for testifying in the earlier armed robbery trial was that "I was hoping they would be lenient, yes, sir." (R. 318)

Later, still during cross-examination, Harry Trapp was questioned about his motives for testifying in the instant murder prosecution. He stated that he had not been given immunity for testifying in the current case, and that he had not made any deals in return for his testimony. (R. 342) He further stated that no one had ever told him he would not be prosecuted for the murder, and in fact he did not know if he was ever going to be charged with the murder or not. (R. 342-343)

During closing arguments, counsel for the defendants repeatedly directed the jury's attention to the issue of the credibility of Harry Trapp. (R. 457-458, 460-469, 478-479, 481-483) Specifically, defense counsel argued that by testifying as a State's witness here, and in the earlier armed robbery trial, Harry Trapp had made it unsafe

for himself to return to the penitentiary system, due to the system's own "grapevine." (R. 479) "[Y]ou know what these two men have been able to do for themselves by testifying here. They know, irrespective of what the State's Attorney will tell you, there is no way that those men can go back into the penitentiary system." (R. 479) In rebuttal, the prosecutor responded in the following fashion: "Trapp is going to the penitentiary. We are not going to set them up. They are not going to live at the Hyatt Regency tomorrow. They are going to the penitentiary." (R. 493)

Thereafter the jury was instructed that evidence that a witness has been convicted of a crime may be considered when determining that witness' credibility; (R. 505) that the testimony of an accomplice witness is subject to suspicion, should be considered with caution, and carefully examined in light of other evidence; (R. 506) that the jury must determine whether the witness' testimony has been effected by his interest or prejudice against the defendant; (R. 507) and that the testimony of an addict is to be scrutinized with great caution, and that addiction is an important factor going to the general reliability of the witness (R. 508). On May 22, 1980, the jury returned a verdict of guilty of murder against petitioner, Gerald Burks. (R. 522)

On December 29 and 31, 1980, hearings were held on petitioner's amended motion for new trial, his second amended motion for new trial, and his motion to have Harry Trapp granted immunity. On the motion to have Harry Trapp given immunity, the petitioner called an assistant state's attorney who had been one of the prosecutors at petitioner's murder trial. (Report of Proceed-

ings, December 31, 1980, at 76, 79 (hereinafter cited as R.P.)).

When asked if it had been decided that Harry Trapp would not be prosecuted for murder, the prosecutor indicated that, at the time of petitioner's trial, he, the prosecutor, knew that a decision had been made to give Harry Trapp "some sort of consideration," but he was never involved in any discussions and was not aware what consideration would actually be given. (R.P. 81) The prosecutor was never asked if, to the knowledge of the prosecution, any of the testimony given by Harry Trapp at trial was false. Neither was the prosecutor ever asked if he had any knowledge regarding the circumstances of the dismissal of the armed robbery charge pending against Harry Trapp.

After hearing all of the evidence presented, the trial court denied petitioner's post-trial motion. The Illinois Appellate Court affirmed, and the Illinois Supreme Court denied leave to appeal. No post-conviction petition was ever filed.

REASONS FOR DENYING THE WRIT

PETITIONER WAS AFFORDED DUE PROCESS WHERE THE RECORD AFFIRMATIVELY DEMONSTRATES, AND THE APPELLATE COURT SO FOUND, THAT EVIDENCE OF A PROSECUTION WITNESS' BIAS WAS FULLY PRESENTED TO THE JURY, WHERE PETITIONER WAIVED THE ISSUE IN THE STATE TRIAL COURT BELOW, AND WHERE THE RECORD IS DEVOID OF SUPPORT FOR PETITIONER'S CONTENTION THAT THE PROSECUTION MADE KNOWING USE OF PERJURED TESTIMONY, OR MADE A FALSE STATEMENT TO THE JURY DURING ARGUMENT.

This petition must be denied. There is a complete absence of any factual basis to support petitioner's mere allegations that the prosecution made knowing use of perjured testimony, or that the prosecutor made a false statement to the jury during argument. This is due in large part to the petitioner's failure to refer to the instant issue with any degree of specificity in his post-trial motion, thereby waiving appellate review of the issue. Nevertheless, the Appellate Court addressed the issue and properly reached the correct result below when it rejected the instant contention and ruled that the subject of witness Harry Trapp's hoped-for leniency was fully explored at trial, and thus the comment during argument, even if improper, did not warrant reversal. Furthermore, it would violate the well-settled principle of appellate law that reviewing courts are limited to the record were this Court to grant the instant petition, since petitioner's entire argument is predicated, not on the record, but on speculation as to what other facts might exist.

Where there has been a plea agreement, or other similar deal made between the prosecution and one of its witnesses prior to the witness' testimony, the witness denies its existence during testimony, and the government fails to correct the falsity but rather knowingly uses the perjured testimony to its advantage, reversal of any convictions obtained as a result of that testimony is required. *Giglio* v. *United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Napue* v. *Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Moreover, if there is evidence of a plea bargain at some point in time, *DeMarco* v. *United States,* 415 U.S. 449, 94 S.Ct. 1185, 39 L.Ed.2d 501 (1974), would require remand to the trial court to determine through an evidentiary hearing whether the plea bargain occurred prior to the giving of the testimony. However, where there is no evidence in the record to support the allegation that a plea agreement, or other deal, was ever reached between the witness and the prosecution, neither reversal nor remand is warranted. *United States* v. *Ramirez,* 608 F.2d 1261, 1266-67 (9th Cir. 1979); *United States* v. *Piet,* 498 F.2d 178, 182 (7th Cir. 1974), *cert. denied,* 419 U.S. 1069.

In the instant case, petitioner has presented nothing to establish that the prosecutors below promised Harry Trapp that they would dismiss his armed robbery indictment, or that they would not indict him for the murder of Venson Bass, if he testified favorably against petitioner. There is no indication in the record that Harry Trapp's testimony that he made no deals, had been given no promises, and only hoped for leniency, was anything but the truth.

> "While steadfastly denying the existence of a plea bargain both at his own arraignment and at the trial

> of [defendants], [the witness] expressed his hope that the court would favorably consider his cooperation with the government in subsequently sentencing him. *The mere expression of one's hopeful (and not unreasonable) expectation cannot be equated with concrete indicia of an undisclosed plea bargain.*" *United States* v. *Piet*, 498 F.2d 178, 182 (7th Cir. 1974), *cert. denied*, 419 U.S. 1069. (emphasis added)

Thus, with only Harry Trapp's reasonably hoped for leniency as "evidence", petitioner has failed to demonstrate the existence of an undisclosed promise or deal.

Further, the assistant state's attorney who testified at the post-trial motion never testified to the existence of any promise that had been made to, or any deal that had been made with, witness Trapp. Additionally, although the assistant state's attorney testified that he was aware that some consideration, unknown to him, would be given Mr. Trapp, the prosecutor never testified that this fact had been communicated to Mr. Trapp.

Moreover, the petitioner himself contributed to the lack of a record upon which to base his current claim when he failed to question the prosecutor as to the reasons why Harry Trapp's armed robbery case had been dismissed six months earlier. Such a question might very well have disclosed the fact that the State had decided that it no longer had sufficient evidence, for whatever reason, to prosecute Mr. Trapp, and that it was not done pursuant to any "agreement." The prosecutor also was never asked if the prosecution knew any of Mr. Trapp's testimony to be false at the time it was given, or if it knew for a certainty that Mr. Trapp subsequently would not go to the penitentiary when it argued to the contrary at trial. To fail to ask questions such as these when

presented with an opportunity to do so must certainly serve to preclude an argument at this time based upon speculation as to what answers might have been given to the never-asked questions.

Further, although petitioner was ultimately asked certain questions regarding the issue of an alleged undisclosed agreement, it was not pursuant to a motion directed to that issue. Although one of petitioner's post-trial motions referred to the alleged falsity of Harry Trapp's testimony, it was only alleged that his testimony was false as it related to petitioner Gerald Burks. No allegation was ever made that an agreement had been made, or that Harry Trapp had testified falsely in that regard. Thus, review of the issue upon appeal was waived. Illinois criminal procedure requires that a motion for a new trial "specify" the grounds therefore. Ill. Rev. Stat. 1979, ch. 38, §116-1(c). When an alleged error is not referred to at all in a post-trial motion, or is not referred to with sufficient particularity to bring the specific issue to the attention of the trial court, the issue is waived. *Brown* v. *Decatur Memorial Hospital,* 83 Ill. 2d 344, 349-350, 415 N.E.2d 337, 339 (1980); *People* v. *Turk,* 101 Ill. App. 3d 522, 532, 428 N.E.2d 510 (1st Dist. 1981). Thus, where the issue of the alleged deal and the closing argument comment was never specified in a post-trial motion, petitioner waived review of the issue. Moreover, petitioner has never filed a petition pursuant to the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. 1981, ch. 38, §122-1.

Petitioner relies heavily on two of this Court's decisions, *Napue* v. *Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), and *Giglio* v. *United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Neither is of benefit to petitioner, but rather each demonstrates

why this petition should be denied. Totally unlike the present situation, in *Napue* it was a matter of record that the prosecutor had in fact made a deal with the witness, and the prosecutor filed a sworn petition to that effect. Therefore, the testimony of the witness, elicited by the prosecutor, that the prosecutor had never promised such a deal, was false and the prosecutor knew it to be so. 360 U.S. at 265-266. No such knowing use of, and failure to correct, perjured testimony, as found in *Napue*, is found in the instant case, and thus denial of the petition is proper.

Similarly, in *Giglio* v. *United States*, *supra*, an unindicted co-conspirator, Taliento, testified at trial that he had not been told he would not be prosecuted if he testified at trial, but rather testified that he believed the government could still prosecute him. 405 U.S. at 151-152. In fact, the affidavit of a prosecutor established that he had "promised Taliento that he would not be prosecuted if he cooperated with the government." 450 U.S. 152. Thus, this Court held that due process required a new trial. 405 U.S. at 155. Again, *Giglio* like *Napue* is distinguishable from the instant case because the record in *Giglio* amply demonstrated that there was a deal or promise that a witness lied about, that the prosecutor knew of the falsity, and that he nevertheless failed to correct the situation.

The same can be said of petitioner's other two cases. In *United States* v. *Pope*, 529 F.2d 112 (9th Cir. 1976), an assistant United States attorney filed an affidavit, establishing that there was an agreement, thereby creating a record with sufficient evidence to warrant a reversal. Similarly, the facts of *United States* v. *Smith*, 480 F.2d 664 (5th Cir. 1973), indicate that there was in fact an

agreement between the prosecution and the witness, and the evidence of that agreement was found in statements made in open court by the prosecutor during the witness' subsequent sentencing. However, the prosecutor never disclosed the extent of the deal at trial, and failed to correct the false testimony of the witness regarding the agreement. Thus, in *Smith* the agreement was a matter of record, and not merely "evidenced" by speculation as in the instant case.

As the court recognized in *United States* v. *Ramirez*, 608 F.2d 1261, 1266 (9th Cir. 1979):

> In cases in which the courts have ordered new trial on *Giglio* grounds, it was clear that an undisclosed agreement of leniency between the Government and the witness had been reached prior to the witness's testimony. Although Zamora [the witness] was indeed allowed to plea to a misdemeanor shortly after appellant's trial, the record is void of any evidence that an agreement allowing such a disposition had been reached at the time of the trial which was not disclosed to the jury. (footnote omitted)

Here, where the record is similarly void of any evidence that an agreement had been reached at the time of trial, or ever, this petition must be denied.

Additionally, the Appellate Court below properly reached the correct result. Although the comment in closing argument that Harry Trapp would go to the penitentiary ultimately proved to be incorrect, there is absolutely nothing in the record to indicate that the prosecutor knew that Trapp would not be tried, convicted, and sentenced on the pending armed robbery charge. Thus, although the Appellate Court noted that the prosecutor was incorrect since Trapp ultimately never

did go to the penitentiary, the subject of Trapp's hoped-for leniency was extensively cross-examined, his character was before the jury, and therefore the Appellate Court held that this one comment, standing alone, did not warrant reversal.

Further, to grant relief on this record, with the absence of any proof that an agreement existed, would create chaos in the law since such action would be in direct conflict with the well-established principle that a reviewing court is limited to the record.

> For an assignment of error, the record must show error; hence, the record must be preserved for an adequate assessment on appeal. This is so because, on review, "the reviewing court is restricted in its examination to the record." A reviewing court may not guess at the harm to an appellant or hypothesize . . . where a record is incomplete. This is not its role. Rather the reviewing court evaluates the record, as it is, for error. Where the record is insufficient or does not demonstrate the alleged error, the reviewing court must refrain from supposition and decide accordingly.

People v. *Edwards,* 74 Ill. 2d 1, 383 N.E.2d 944, 946 (1978) (citation omitted).

That the record is devoid of support for this petition is obvious. Moreover, petitioner already had his opportunity to make a record, and let it pass, when he failed to question the prosecutor more fully. Interestingly enough, since petitioner has never established the existence of an agreement, he was not entitled to an evidentiary hearing under *DeMarco* v. *United States,* 415 U.S. 449, 94 S.Ct. 1185, 39 L.Ed.2d 501 (1974). *See, United States* v. *Ramirez,* 608 F.2d 1261, 1267 (9th Cir. 1979); *United*

States v. *Piet*, 498 F.2d 178, 182 (7th Cir. 1974); *United States* v. *Curry*, 497 F.2d 99, 101 (5th Cir. 1974). Thus, although petitioner was able to question one of the trial prosecutors, who did not object to being called, the trial court recognized that he had a right to do so when it sustained the objection of the other prosecutor to being called as a witness, absent some *prima facie* showing of a promise or agreement. (R.P. 17, 18)

In summary, this petition for a Writ of Certiorari should be denied because petitioner was in fact afforded due process where the record demonstrates, and the Appellate Court so found, that evidence of prosecution witness Harry Trapp's bias was fully presented to the jury, where petitioner waived the issue in the state trial court below, and because the record is utterly devoid of support for petitioner's contentions that Harry Trapp committed perjury, or that the prosecution was aware of it at the time but took no action, or that the prosecution made a knowing false statement to the jury during rebuttal argument.

CONCLUSION

The People of the State of Illinois respectfully request that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

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